

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
NORBERG N. VIVES	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NOS. 817289
Personal Income Tax under Article 22 of the Tax Law and	:	AND 817325
the Administrative Code of the City of New York for	:	
the Year 1994.	:	

Petitioner, Norberg N. Vives, 80 Amsterdam Avenue, Apartment 5C, New York, New York 10023, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1994.¹

On January 7, 2000, the Division of Taxation, by its representative Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion for summary determination seeking dismissal of the petitions in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. Petitioner, appearing *pro se*, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for the issuance of this determination commenced on February 7, 2000, the date on which petitioner's time to serve a

¹ Petitioner protested the same assessment, L015706436, twice.

response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest challenging a Notice of Deficiency issued by the Division of Taxation.

FINDINGS OF FACT

1. At issue on this motion is a Notice of Deficiency, dated December 21, 1998, addressed to petitioner, Norberg N. Vives, at 400 West 152nd Street, Apartment 4E, New York, New York 10031-1948. This notice bears assessment number L-015706436-3 and certified mail control number P 911 002 444. The notice asserts a total of \$645.00 in additional New York State and New York City personal income tax due, plus interest of \$214.49 and penalty in the amount of \$359.04, for a total amount due of \$1,218.53 for the year 1994.

2. Petitioner filed a Request for a Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). The unsigned and undated request was made on the payment document issued by the Division's Tax Compliance Division as well as on the Collection Notice.² Each of these documents contained the following statement: "I requested for [sic] a conciliation conference. However I have not gotten an answer. See attached copies." The documents constituting petitioner's conciliation conference request were sent by United States Postal Service ("USPS") Express Mail. The record includes a copy of

² The Collection Notice is dated June 3, 1999.

the Express Mail label, "Addressee Copy." One of the sections on this label is entitled "ORIGIN (POSTAL USE ONLY)" and contains the following handwritten information in the "Date In" box: 6/9/99. Another section entitled "From" contains the following handwritten address: "Norberg Vives #5C, 80 Amsterdam Ave, NYC, NY 10023." Both the request and the Express Mail label bear a BCMS indate receipt stamp of June 10, 1999.

Attached to the two documents which constituted petitioner's request were copies of the following documents: petitioner and Maria Neri-Navarrete's³ joint 1998 Resident Income Tax Return (Form IT-200), as well as their 1998 Claim for Earned Income Credit (Form IT-215)⁴ and the 1998 W-2 Wage and Tax Statement⁵ issued by the Department of Veterans Affairs to petitioner.

3. On June 25, 1999, BCMS issued a Conciliation Order Dismissing Request (CMS No. 175558) which stated as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on December 21, 1998, but the request was not received until June 10, 1999, or in excess of 90 days, the request is late filed.

The request for a Conciliation Conference is denied.

4. On August 24, 1999, petitioner filed a petition with the Division of Tax Appeals seeking a redetermination of the deficiency issued in this matter. With respect to the timeliness of petitioner's request for a conciliation conference, the petition contains the following assertions:

³ Maria Neri-Navarrete is not a party to this proceeding. Ms. Neri-Navarrete is also known as Maria Neri-Vives in some of the documents in the record.

⁴ Both Form IT-200 and Form IT-215 list the taxpayers' mailing address as: 400 West 152 Street, [Apartment number] 4E, New York, NY 10031. The mailing address is handwritten on both forms.

⁵ The W-2 lists the employee's name, address and zip code as follows: Vives, Norberg, 80 Amsterdam Ave Apt 5C, New York NY 10023.

1. I did not receive a collection notice with a Request for Conciliation notice form for year 1994 until after the 90-day deadline.

2. When I filed a Request for Conciliation Conference, it was dismissed because it was not filed within the time allowed by the tax law.

3. I called (518) 485 - 8538, and spoke to a Mr. Cohen or David (I don't quite recall the name). I called him in reference to a collection notice I received sometime in May or June of 1999. I explained to him that I wanted to file a Request for Conciliation Conference, but he told me that it was too late and to wait for a letter. I explained that this is the first time that I got a collection notice for year 1994, and no form to request for a conciliation conference came with the collection notice. I decided to file a Request for Conciliation Conference, but it was denied for not filing within the 90 days allowed by the tax law.

5. In support of the motion for summary determination, the Division submitted its answer to the petition; an affidavit of its representative, Christina L. Seifert, Esq.; the affidavits of Geraldine Mahon and James Baisley, employees of the Division; a copy of the Division's certified mail record for December 21, 1998 entitled "ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL"; a copy of the Notice of Deficiency issued to petitioner dated December 21, 1998; and a copy of the USPS Express Mail label which was attached to the envelope which contained petitioner's Request for Conciliation Conference.

6. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

She explained how she receives a computer printout or certified mail record ("CMR") and the corresponding statutory notices, each predated with the anticipated date of mailing and each assigned a certified control number. The CMR for the block of notices issued on December 21,

1998, including the notice issued to petitioner, consisted of 40 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the USPS. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on December 21, 1998, including the notice issued to petitioner, bears certified control numbers which run consecutively (P 911 002 375 through P 911 002 809). Each page contains 11 entries, with the exception of the last page (page 40) which contains 6 entries.

In the upper left hand corner of page 1 of the CMR, the date "12/11/98" was manually changed to "12/21/98." The original date of "12/11/98" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "12/11/98" to "12/21/98" was made by personnel in the Division's Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a USPS postmark to a page or pages of the CMR. In this particular case, the USPS representative signed or initialed page 40 of the CMR, affixed a postmark to each page of the CMR and circled "435" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 7 of the CMR indicates that a Notice of Deficiency, with notice number L 015706436, was sent to Norberg N. Vives, 400 W 152 ST 4E, New York, NY 10031-1948, by certified mail using control number P 911 002 444. A USPS postmark of December 21, 1998 appears on each page of the CMR.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on December 21, 1998.

7. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"). He supervises the entire mail processing staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the mailroom in an area designated "Outgoing Certified Mail." A CMR is also received by the mailroom for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the mailroom staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the mailroom to

indicate the total number of pieces received either by circling or by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of the Division's mailroom staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing pieces of certified mail delivered to the Colonie Center branch office of the USPS by the mailroom staff on December 21, 1998. The review confirmed that a USPS employee initialed page 40, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 435 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including exhibits attached to the affidavit, and his personal knowledge of the procedures of the mailroom, he was able to determine that a mailroom employee delivered a piece of certified mail addressed to Vives - Norberg N., 400 W 152 ST 4E, New York, NY 10031-1948 to the Colonie Center branch of the USPS in Albany, New York in a sealed, postpaid, windowed envelope for delivery by certified mail. Based upon his review of the CMR, he could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on December 21, 1998 for the records of the Division's CARTS Control Unit. Mr. Baisley stated that these procedures which were described in his affidavit are the regular procedures followed by the mailroom staff

in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed on December 21, 1998.

8. The address on the subject Notice of Deficiency is the same as the address given on petitioner's filed 1996 and 1998 resident income tax returns (Form IT-201 and Form IT-200, respectively), both of which were signed by petitioner and dated March 26, 1998 and April 30, 1999, respectively.

9. As noted above, petitioner did not respond to the motion for summary determination.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a

“drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioner in this case did not respond to the motion of the Division for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept., supra* at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]).

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section

further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency or, alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see*, *Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon and James Baisley provide adequate proof of the Division’s standard procedures for the mailing by certified mail of notices of deficiency. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the Notice of Deficiency and the certified mail record submitted as evidence of actual mailing of the notice to petitioner. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner. Petitioner’s name and address appear on page 7 of the CMR which bears a USPS

postmark of December 21, 1998. There are 435 certified control numbers listed on the 40 pages of the CMR and the USPS employee who initialed the CMR on the last page thereof indicated that he or she received 435 items for mailing. The Notice of Deficiency contained the same certified control number (P 911 002 444) which was set forth on the CMR. The Division has, therefore, established that it mailed the Notice of Deficiency to petitioner, by certified mail, on December 21, 1998. Accordingly the 90-day period for the filing of petitioner's Request for Conciliation Conference commenced on December 21, 1998.

E. Although petitioner alleges that he did not receive the Notice of Deficiency, he does not contend that the West 152nd Street, New York, New York address to which the notice was sent by the Division was incorrect. The Division has submitted proof that the Notice of Deficiency was issued to petitioner at the address on the last income tax return filed by him. Accordingly, it is determined that the Division sent the Notice of Deficiency to petitioner's last known address in accordance with Tax Law § 681(a).

F. Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is an income tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028; *cf., Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*). Once the statutory notice is mailed,

the taxpayer has 90 days within which to petition for a redetermination or file a request for a conciliation conference (*see*, Conclusion of Law “C”).

G. As noted in Conclusion of Law “C,” a Notice of Deficiency becomes an assessment unless the taxpayer files a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS within 90 days after the notice is issued. The last day on which petitioner could have timely filed the request was March 22, 1999.⁶ The Request for Conciliation Conference was mailed to BCMS on June 9, 1999 and received by BCMS on June 10, 1999. Unfortunately, this date is past the statutory 90-day period within which a request for a conciliation conference may be filed. Accordingly, the Division properly denied the request for conference and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner’s case.

H. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division of Taxation's motion for summary determination is granted and the petitions of Norberg N. Vives are hereby dismissed.

DATED: Troy, New York
April 27, 2000

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

⁶ Ninety days from December 21, 1998 was March 21, 1999 which was a Sunday, making Monday, March 22, 1999 the due date for the request (*see*, Tax Law § 691[c]; General Construction Law §§ 20, 25-a; *Matter of American Express Company and American Express International Banking Corporation*, Tax Appeals Tribunal, July 3, 1991).

